

NEPA Litigation Update

2006 Federal Aviation Administration
Environmental Forum

Norton v. Southern Utah Wilderness Alliance

- Environmental organization sued DOI, BLM, the State of Utah, and named individuals to compel, under the APA, agency action in light of defendants' alleged failure to manage off-road vehicle use in federal lands classified as wilderness study areas.
- The District Court dismissed for lack of subject matter jurisdiction and denied non-profit corporation's motion for preliminary injunction.
- Corporation appealed.
- The Court of Appeals for the Tenth Circuit reversed and remanded.
- Certiorari was granted by the United States Supreme Court.

SUWA's NEPA Claim

- A CEQ regulation requires supplementation where “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”
- The Supreme Court had previously interpreted NEPA in light of this regulation to require an agency to take a “hard look” at the new information to assess whether supplementation might be necessary.
- SUWA contended that BLM did not fulfill its obligation under the National Environmental Policy Act of 1969 to take a “hard look” at whether to undertake supplemental environmental analyses for areas where ORV use had increased.

But, the Supreme Court Disagreed...

- Scalia, J. – “As we noted in [*Marsh v. Oregon Natural Resources Council*], supplementation is necessary only if ‘there remains ‘major Federal actio[n]’ to occur,’ as that term is used in [NEPA]. In *Marsh*, that condition was met: the dam construction project that gave rise to environmental review was not yet completed. Here, by contrast, although the ‘[a]pproval of a [land use plan]’ is a ‘major Federal action’ requiring an EIS, (emphasis added), that action is completed when the plan is approved. The land use plan is the ‘proposed action’ contemplated by the regulation. There is no ongoing ‘major Federal action’ that could require supplementation (though BLM is required to perform additional NEPA analyses if a plan is amended or revised.” (citations omitted).

City of Oxford v. FAA

- City abutting regional airport for which FAA had approved neighboring city's renovation plan sought judicial review of approval order, alleging violations of NEPA and NHPA.
- The City of Oxford, Georgia petitioned the court to review the FAA's order approving revisions to the ALP at the Covington Municipal Airport.
- The City asserted that the FAA failed adequately to assess the environmental impacts of the airport renovation project proposed in the ALP, as required by the NEPA, and that the FAA failed to comply with the procedural requirements imposed by the NHPA for analyzing the project's impacts on historic properties.
- The Court found that the FAA fulfilled its obligations under NEPA and the NHPA, and denied the petition for review.

The 11th Circuit held...

- FAA was not required under NEPA to take into account possible cumulative impact of actions that were speculative, including highway widening that apparently was not being planned.
- FAA was not required by NHPA to do more than notify consulting parties of public meetings concerning studies whose relevance to historic preservation should have been obvious.
- NHPA did not require FAA to provide consulting parties with certain correspondence when notifying them of finding of no impact.

National Audubon Society v. Navy

- Two counties and environmental organizations brought actions against Department of the Navy and related officials, alleging, *inter alia*, that Navy violated NEPA in deciding to construct aircraft landing training field within five miles of national wildlife refuge.
- Actions were consolidated, and the District Court granted summary judgment for plaintiffs on **NEPA** claims and entered permanent injunction.
- Defendants appealed.

The 4th Circuit held...

- Various components of EIS prepared by Navy, when considered together, established that Navy did not conduct hard look mandated by NEPA.
- Failure of EIS to adequately address project's environmental impacts rendered insufficient its consideration of mitigation measures.
- Inadequacy of EIS did not compel issuance of broad injunction prohibiting Navy from taking any further activity associated with planning, development, or construction of training field prior to its compliance with its obligations under NEPA.
- Injunction had to be narrowed to permit Navy to engage in certain activities while it completed SEIS.
- Affirmed in part; vacated and remanded with instructions in part.